Center for Democracy and Technology ("CDT") confirmed in its comments, Section 105 was primarily intended to ensure that law enforcement--or anyone else--could not remotely activate an interception.[75]

Thus, the Commission's rules must require carriers to establish appropriate policies and procedures for the supervision and control of their officers and employees to require appropriate authorization before activating any interception and to prevent such interception without authorization.[76] The concern of Congress is reflected in the following passage, which is worth quoting in full:

> [Section 229] makes clear that government agencies do not have the authority to activate remotely interceptions within the switching premises of a telecommunications carrier. Nor may law enforcement enter onto a telecommunications carrier's switching office premises to effect an interception without the carrier's prior knowledge and consent when executing a wiretap under exigent or emergency circumstances under section 2602(c). All executions of court orders or authorizations requiring access to the switching facilities will be made through individuals authorized and designated by the telecommunications carrier. Activation of interception orders or authorizations originating in local loop wiring or cabling can be effected by government personnel or by individuals designated by the telecommunications carrier, depending upon the amount of assistance the government requires.[77]

As this passage reveals, the focus of Section 229 is to ensure against improper law enforcement access, not the acts of carrier employees (especially given the lack of any record evidence of employee defalcations). Read in this light, the remainder of the Section 229

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[75] AT&T Comments at 34 (citing House Report at 3506); Comments of CDT, filed December 12, 1997 ("CDT Comments"), at 12.

[76] 47 U.S.C. § 229(b)(1)(A), (B).

[77] House Report at 3506.

provisions should be aimed at carriers keeping secure and accurate records of any interception with or without authorization (again, aimed at law enforcement remotely accessing the switch to the extent such appearances are noted) and to submit carrier policies to the Commission for review to ensure that such procedural safeguards are in effect.[78]

There is no suggestion in CALEA that carrier policies must be uniform or that the Commission is empowered to make them so. To the contrary, Section 229 contemplates that carriers submit their individual policies to the Commission for review.[79] The Commission may order a modification of the policies if it fails to comply with Commission rules issued under Section 229.[80] Thus, Section 229(c) clearly contemplates individualized review of carrier policies to achieve the objectives noted above.

The FBI has opposed the use of carrier certifications of compliance proposed by the Commission[81] for smaller carriers;[82] Ameritech proposes a distinction based on geography rather than size[83]; CTIA urges that it should be sufficient for all carriers to certify compliance.[84] Section 229(b)(3) requires the submission of carrier policies without exception, but this requirement is qualified by Section 229(a), which permits the Commission to promulgate rules

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78 47 U.S.C. § 229(b)(2), (3).

79 47 U.S.C. § 229(c).

80 Id.

81 NPRM, ¶ 35.

82 FBI Comments at 32-35.

83 Ameritech Comments at 6.

84 CTIA Comments at 28.

only as necessary. AT&T supports CTIA's proposal to require general carrier certification that it has implemented procedures to meet Section 229 requirements. CALEA grants the Commission the power to conduct "investigations as may be necessary to insure compliance" with its regulations and such investigations no doubt can be initiated by requests to review carrier policies for compliance. Thus, the burden can be reduced on carriers while furthering the goals of CALEA.

In light of the above analysis and the uniform response from industry in opposition to burdensome rules proposed by the Commission, AT&T does not comment beyond its initial Comments regarding the specific merits of the reporting and recordkeeping proposals of the Commission. AT&T simply notes that here again the FBI stands in stark contrast to the comments of industry in general with its "command and control" proposals for carrier security. There is no support in CALEA or its history for such an interpretation and any rules reflecting the FBI proposals would be arbitrary and capricious.

D. Definition of Telecommunications Carrier.

1. All Information Services Should Be Excluded From Section 103 Requirements.

As AT&T stated previously, both the legislation and legislative history are very clear that CALEA does not cover information services, regardless of the type of entity providing the service.[85] The telecommunications industry in general and privacy groups filing comments

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[85] AT&T Comments at 39-40.

agree.[86] For example, USW correctly notes that the definition of "telecommunications carrier" found in 47 U.S.C. § 1001(8)(C) "explicitly excludes from its scope any carrier operations or activities involving the provision of information services , i.e., a telecommunications carrier 'does not include persons or entities insofar as they are engaged in providing information services'".[87] USW argues that the definition of telecommunications carrier in 47 U.S.C. § 1001(8) cannot be read to include a provider of exclusively information services because such a provider is not a common carrier. If the phrase "insofar as they are engaged in providing information services" is to have any meaning, it must be construed as applying to telecommunications carriers that (i) fall within one of the specified categories of 47 U.S.C. § 1001(8) (i.e., common carriers) and (ii) also provide information services.[88]

The FBI advocates a "conservative definition of information services because of the possible criminal uses of such services."[89] However, whether or not a particular service is more or less likely to be used by criminals is not the test. The Commission has no power to

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[86] See, e.g., ACLU Comments; Ameritech Comments at 2-3; CTIA Comments at 23-24; USTA Comments at 5 ("The plain language of Section 103(b)(2)(A) of CALEA exempts all information services from CALEA"); USW Comments at 7-10.

[87] USW Comments at 7.

[88] USW Comments at 7-8. USW also notes that the term "information services" was adopted as the successor term to "enhanced services" in the Telecommunications Act of 1996, and Congress had no difficulty in excluding information services from the definition of telecommunications services subject to its other regulatory requirements. See USW Comments at 8 n.9, 9-13.

[89] FBI Comments at 15. Here again, the FBI proposes something directly contrary to the express admonition of Congress: "It is the Committee's intention not to limit the definition of 'information services' to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of 'information services.'" House Report at 3501.

promulgate rules that subject information services to CALEA coverage, even if such services provide a communications tool for criminals.

No "conservative" definition of information services is required--all information services are excluded. Conversely, as Congress noted, "[t]he redirection of the voice mail message to the 'box' and the transmission of an E-mail message to an enhanced service provider that maintains the E-mail service are covered."[90] Thus, if a carrier offers an information service, then that portion of the carrier's offerings is not covered by CALEA.

2. Common Carrier Definition.

The FBI asks the Commission not to include the word "indiscriminately" in its proposed definition of telecommunications carrier as "a company that holds itself out to serve the public indiscriminately." However, the Commission has no authority to change the definition of telecommunications carrier found in Section 102(b)(8) of CALEA. Congress explicitly said there that the definition of telecommunications carrier was to include those acting as common carriers for hire in the transmission of communications. The definition of common carrier that the Commission has applied over the last 20 years has been restricted to those entities that hold their services out indiscriminately to the public.[91] Carriers that do not fall within this definition are considered private carriers.

If the FBI definition of "telecommunications carrier" were applied, it could include private carriers in the definition. This contravenes the clear intent of Congress. In the legislative

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90 House Report at 3503.

91 NPRM at 11. The Commission is following judicial precedent found in National Ass'n of Regulatory Util. Comm'rs v. Federal Communications Comm'n, 525 F.2d 630, 640 (D.C. Cir. 1976), cert. denied, 425 U.S. 922 (1976), in applying this definition.

history, Congress expressly stated that the only entities required to comply with the functional requirements of CALEA are common carriers and explicitly recognized the narrow scope of the legislation.[92] Congress made several references in the legislative history to the deliberate exclusion of private carriers because it felt there were good reasons to keep private services as closed as possible because of their transmission of confidential data.[93] The Commission has no authority, regardless of how helpful it would be to the FBI, to expand the definition of "telecommunications carriers" to include private carriers.

V. CONCLUSION

AT&T urges the Commission to carefully reevaluate its proposed rules for carrier security and to promulgate a narrow set of requirements to which carriers can certify compliance. Further, AT&T strongly encourages the Commission to act on the CTIA request for a blanket extension of the CALEA compliance date. There are good policy reasons to do so now and it would be in the public interest to expeditiously respond to the CTIA petition. Carriers and manufacturers are moving forward with the design and implementation of the industry capability standard so CALEA-compliant hardware and software should be available within the next two years. Concomitantly, the Commission should affirmatively recognize that in the absence of CALEA-compliant hardware and software, compliance is not reasonably achievable.

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92 House Report at 3498.

93 House Report at 3503.

Finally, the Commission should ensure its current policy of regulatory parity for all services extends to information services by recognizing that CALEA intended such services to be exempt from coverage regardless of the nature of the entity providing the service.

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CERTIFICATE OF SERVICE

I, Rena Martens, do hereby certify that on this 11th day of February, 1998, a copy of the foregoing "Reply Comments of AT&T Corp." was served by U.S. first class mail, postage prepaid, to the parties listed below.

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